



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
MILIMANI LAW COURTS

FAMILY DIVISION
SUCCESSION CAUSE NO. 3182 OF 2007

IN THE MATTER OF THE ESTATE OF MESHACK MWANZIA MATHEKA (DECEASED)

FRANCISCA NDUKU MOSU.....APPLICANT/OBJECTOR

-VERSUS-

ESTHER MUMBE MATHEKA.....1ST RESPONDENT
ALFRED MUTUNGA MATHEKA.....2ND RESPONDENT

RULING

1. The deceased Meshack Mwanzia Matheka died intestate on 5th February 2007. His estate comprised monies in banks, shares in companies, a motor vehicle, a container, cereals in a store and house on Plot No. 97/1141/140 in Tassia Estate. On 20th November 2007 his mother Esther Mumbe Matheka (1st respondent) and brother Alfred Mutunga Matheka (2nd respondent) petitioned this court for the grant of letters of administration intestate. The grant was issued to them on 9th April 2008, and confirmed on 28th July 2010. The estate was shared between the two. The house went to the 1st respondent. The respondents had informed the court that the deceased had died without a wife or child.
2. On 6th April 2011 the applicant Francisca Nduku Mosu filed summons dated 5th April 2011 seeking to revoke the grant issued to the respondents. Her case was that she was the deceased's widow, to the knowledge of the respondents, but had been deliberately excluded from the petition and confirmation with the consequence that she had been disinherited. She stated that she had contributed to the property that comprised the estate that the deceased had left. She annexed documents to show her contribution. She went on to complain that her consent had not been sought or obtained at any stage in the proceedings and yet the respondents knew of her relationship with the deceased.
3. The applicant revealed that upon the death of the deceased she had petitioned for the grant of letters of administration intestate in High Court **Succession Cause No. 2175 of 2007** at Nairobi (the same registry), in which she had disclosed that the deceased was survived by her, his mother (the 1st respondent) and his father Matheka Mutahi. The cause had been transferred to High Court at Machakos as **Succession Cause No. 164 of 2008**. The court had issued her with a grant.
4. The respondents opposed the application for revocation, saying that the deceased had died without a family and that the applicant was not the deceased's wife; that the deceased had died a bachelor.
5. The application for revocation came to court severally, with counsel on both sides attending, and on each occasion it was adjourned. On 6th November 2017 the respondent's advocates took a hearing date, in the absence of counsel for the applicant. The date taken was 13th March 2018. On that date the matter went before Justice Farah Amin. The advocate for the respondents was present. The advocate for the applicant was absent. The respondents' advocates informed court that the applicant's advocate had been served. At the request of the counsel for the respondents, the court dismissed with costs the application for revocation.
6. It is that dismissal that led to the present application dated 15th May 2020 in which the applicant sought that the *ex parte* proceedings on 13th March 2018 in which her application was dismissed with costs for want of prosecution be set aside. In the grounds and the supporting affidavit, the applicant stated that her advocate was not served with a hearing notice, and she therefore did not know her matter had come up and had been dismissed. It was later when police went to her following a complaint of obtaining by false pretences that she inquired from her advocate and learnt of the dismissal of her matter.
7. The 1st respondent swore a replying affidavit to reiterate that the deceased died unmarried, and that it was not true, like was alleged in the supporting affidavit, that the applicant was married to him. Regarding service with hearing notice, the 1st respondent stated that her advocate

had served the applicant's advocate. She annexed a hearing notice "EMM-6(a)") dated 9th November 2017 informing the advocate that the application would be heard on 13th March 2018 at 9.00am, and an affidavit of service "EMM-6(b)") showing that the applicant's advocate was on 14th November 2017 served with the hearing notice.

8. The applicant filed a supplementary affidavit to state that she never got any communication from her previous advocate (she has since moved from Kalwa & Co. Advocates to Kinyanjui Kirimi & Co. Advocates) that he had been served with the hearing notice; that it was in early May 2020 that police came to her saying that she had been illegally receiving rent from the Tassia House. When she went to inquire from her then advocate Mr. Kalwa, he informed her that he had checked the court file and found that her application had been dismissed on 13th March 2018. That was when she brought the present application. She swore that she was totally keen to claim her rightful entitlement from the estate of her late husband, and pleaded with the court to give her a chance to make the claim by reinstating the cause.

9. Mr. Kirimi for the applicant and Mr. Solonka for the respondents filed written submissions on the application, and each made reference to decided cases in support of his side of the case. I have considered them.

10. The applicant filed the application through Kalwa & Co. Advocates who were then on record for her. In her supporting affidavit she stated that her advocate had informed her that he had not been served with the hearing notice. Of course, the advocate was not being candid. This is because he had been served with the hearing notice. I guess, when she was confronted with the response that had evidence of service of the hearing notice she changed the advocate. Her case that her advocate did not inform her that her application was coming up for hearing appears to be true. But that did not take away her role in the matter. Although she had instructed counsel, the case was hers and it was her responsibility to ensure that she was constantly kept informed of its progress. Although it is now generally recognised that a client should bear the brunt for mistakes made by his advocate, unless the client can demonstrate that he took tangible steps and exercised due diligence on following up his case (**Omwoyo –v- African Highlands & Produce Co. Ltd [2002]eKLR**), each case has to be considered on its peculiar facts. Like was said by Madan J A (as he then was) in **Belinda Murai widow of Ignatius Mura & Others –v- Amos Wainaina Civil Application No. NAI 9 of 1978 (Unreported)** –

“The court may not condone it but ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates.”

11. Further, I should remind myself of what Apaloo J.A. (as he then was) stated in **Philip Chemwolo & Another –v- Augustine Kubende [1986]eKLR** as follows –

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

12. The evidence she shows that the applicant over-relied on her advocate to tell her what was happening to her case. I am, however, mindful that the application for revocation had come several times over a long time, and on each occasion both sides were present but it did not proceed. On the single day the advocate for the applicant failed to show up it was dismissed.

13. I outlined the nature of the dispute between the applicant and the respondents. Each side filed a petition to succeed the deceased. From the cause numbers, it was in fact the applicant who first petitioned the court. However, the respondents moved faster. I consider that if the application is not allowed, the applicant will be denied the opportunity of proving that she was married to the deceased with the consequence that she will be disinherited. She showed documents that she had participated in the acquisition of the Tassia house. She has expressed the desire to prosecute her claim, and wants the application reinstated.

14. From the facts on record, I do not see the applicant as a person who merely wants to obstruct or delay justice (**Shah –v- Mbogo [1969]EA 116**). She is asking the court to exercise its wide discretion to do justice to her. I consider that the discretion has to be exercised to do justice to both parties, and on such terms that are just. I further recall that justice is sweeter when that case is heard and decided on its merits.

15. Considering all the facts of the case, I find that to deny the applicant the opportunity to prosecute her application for the revocation of the grant issued to the respondents would be unjust and a miscarriage of justice. I further find that it would serve the wider interests of justice to give each side an opportunity to call evidence on the question whether or not the deceased was married to the applicant; and whether the applicant was indeed a beneficiary of the estate left by the deceased. It has been a while since the respondents got a grant which has been confirmed. Reopening the matter will surely be inconvenient to them, but I consider that payment of costs would help reduce the effect of that inconvenience.

16. In the final result, I allow the application and reinstate the application that was dismissed with costs on 13th March 2018.

17. I direct that the application dated 5th April 2011 and filed on 6th April 2011 be mentioned on 20th September 2021 to take directions on its hearing.

18. Costs shall be borne by the applicant who has been indulged.

DATED and DELIVERED at NAIROBI this 22ND day of JUNE 2021.

A.O. MUCHELULE

JUDGE